

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOSTAFA TOFIGHBAKSH,)	Case No. 10-830 SC
individually and on behalf of all)	
others similarly situated,)	ORDER GRANTING PLAINTIFF'S
)	<u>MOTION TO REMAND</u>
Plaintiff,)	
)	
v.)	
)	
WELLS FARGO & COMPANY,)	
WELLS FARGO BANK, N.A., and)	
DOES 1-25, inclusive,)	
)	
Defendants.)	
)	

I. INTRODUCTION

This matter comes before the Court on the Motion to Remand ("Motion") filed by Plaintiff Mostafa Tofighbakhsh ("Plaintiff"). Docket No. 19. Defendants Wells Fargo and Company ("Wells Fargo and Company" or "the Company") and Wells Fargo Bank, N.A. ("Wells Fargo Bank" or "the Bank") filed an Opposition, and Plaintiff submitted a Reply. Docket Nos. 22, 26. For the following reasons, Plaintiff's Motion is GRANTED.

II. BACKGROUND

On December 23, 2009, Plaintiff filed a Complaint in the Superior Court of California, County of San Francisco. Docket

1 No. 1 ("Notice of Removal"), Ex. A ("Compl."). According to the
2 Complaint, Plaintiff is a California resident and a representative
3 of a proposed class of similarly situated California citizens;
4 Wells Fargo and Company is "headquartered" in San Francisco,
5 California; and Wells Fargo Bank is a subsidiary of the Company
6 with "a principal place of business in San Francisco's Financial
7 District." Id. ¶¶ 9-11, 38-40.

8 The Complaint asserts no federal causes of action, and it
9 provides four state-law causes of action: breach of contract,
10 breach of covenant of good faith and fair dealing, violation of
11 section 17200 of the California Business and Professions Code, and
12 unjust enrichment. Id. ¶¶ 51-72. The Complaint refers to
13 Defendants collectively as "Wells Fargo," and does not distinguish
14 between them in alleging the facts giving rise to Plaintiff's
15 causes of action. See id.

16 According to the Complaint, Plaintiff obtained an adjustable-
17 rate loan from World Savings Bank ("World Savings") in September
18 2005. Id. ¶ 32. The interest rate on the loan was calculated
19 using the Cost of Savings Index ("COSI") of World Savings' then-
20 parent company, Golden West Financial Corporation ("GDW"). Id.
21 ¶ 3. World Savings later merged with Wachovia, and Wachovia began
22 to use its own index ("Wachovia COSI"), rather than the GDW COSI,
23 to determine the interest rate on Plaintiff's loan. Id. ¶¶ 4, 21.
24 After Wells Fargo acquired Wachovia on December 31, 2008, it
25 retired the Wachovia COSI, calculating the rate using a new index
26 ("Wells Fargo COSI"). Id. ¶¶ 4, 26-27. Plaintiff alleges that the
27 method of calculation of the Wachovia and Wells Fargo COSIs
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1 breached Plaintiff's initial loan contract and resulted in
2 "increased interest rates and mortgage payments for former World
3 Savings Bank customers." Id. ¶¶ 4, 52-54. Plaintiff alleges that
4 through the acquisition of Wachovia, Defendants "assumed the rights
5 and obligations for Plaintiff's loan," and thus are liable for
6 Wachovia's earlier decision to replace the GDW COSI. Id. ¶ 35.

7 On February 26, 2010, Defendants removed the case to federal
8 court, arguing that the Company is a sham defendant named only to
9 destroy diversity. Notice of Removal ¶¶ 3, 5-8. Plaintiff moves
10 to remand the case back to state court.

11 12 **III. LEGAL STANDARD**

13 Any civil action brought in a state court may be removed to
14 this Court if there is complete diversity of citizenship and where
15 the amount in controversy exceeds \$75,000. 28 U.S.C. §§ 1332,
16 1441. A defendant may remove a case lacking complete diversity and
17 seek to persuade the district court that any non-diverse defendant
18 was fraudulently joined. McCabe v. Gen. Foods Corp., 811 F.2d
19 1336, 1339 (9th Cir. 1987). "If the plaintiff fails to state a
20 cause of action against a resident defendant, and the failure is
21 obvious according to the settled rules of the state, the joinder of
22 the resident defendant is fraudulent." Id. A defendant must prove
23 fraudulent joinder by clear and convincing evidence, and there is a
24 general presumption against fraudulent joinder. Hamilton
25 Materials, Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1206 (9th Cir.
26 2007). Fraudulent joinder claims may also be resolved by "piercing
27 the pleadings" and considering summary judgment-type evidence such
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1 as affidavits and deposition testimony. Morris v. Princess
2 Cruises, Inc., 236 F.3d 1061, 1068 (9th Cir. 2001) (quoting
3 Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 259 (5th
4 Cir.1995)). However, the court must resolve "all disputed
5 questions of fact and all ambiguities in the controlling state law
6 in favor of the non-removing party." Plute v. Roadway Package
7 System, Inc., 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001) (quoting
8 Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir.
9 1992)).

10 11 **IV. DISCUSSION**

12 Nowhere in their Opposition do Defendants dispute that Wells
13 Fargo and Company is a citizen of California for the purposes of
14 determining diversity jurisdiction. See Opp'n. Thus, if the
15 Company is not fraudulently joined, there is no diversity between
16 every plaintiff and every defendant, as required by 28 U.S.C. §
17 1332, and neither are the class-action diversity requirements of 28
18 U.S.C. § 1332(d) met. Thus, this Motion turns on whether the
19 Company is a sham defendant.

20 Defendants argue that Wells Fargo and Company is fraudulently
21 joined because Plaintiff has failed to state a cause of action
22 against the Company. Opp'n at 3. Defendants allege that the
23 Company played no role in changing the COSI, and that "only the
24 Bank (or its predecessor banks), as the sole owner of Plaintiff's
25 mortgage, could make any decisions, or take any actions, with
26 respect to Plaintiff's mortgage or the index governing his
27 mortgage." Id. Defendants additionally argue that the Complaint
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1 insufficiently pleads facts supporting indirect liability for the
2 Company for the Bank's actions. Id. at 6.

3 Plaintiff counters by submitting exhibits it claims show Wells
4 Fargo and Company is directly liable "by virtue of its role in
5 overseeing the merger between Wells Fargo Bank and Wachovia Bank,
6 as well as the creation of the Wells Fargo COSI." Reply at 3.

7 Plaintiff attaches a biography, taken from Wells Fargo's web site,
8 of Patricia R. Callahan ("Callahan"), Wells Fargo and Company's
9 "Executive Vice President, Office of Transition." Abtahi Decl.,
10 Exhibit D ("Callahan Bio").¹ According to this biography, Callahan
11 "is responsible for providing oversight and strategic direction for
12 the merger of Wells Fargo & Company and Wachovia Corporation"
13 through the Company's Office of Transition, which "coordinates
14 merger-related activities among all businesses for both companies,
15 gathers and assesses information, tracks progress, shares best
16 practices, and will help create the new Wells Fargo." Id. A
17 biography of Mark Oman ("Oman") taken from the same web site
18 identifies Oman as Wells Fargo and Company's "Senior Executive Vice
19 President, Home and Consumer Finance." Abtahi Decl., Exhibit C
20 ("Oman Bio"). According to the biography, Oman is "leading the
21 integration of Wachovia's mortgage operations into the Wells Fargo
22 Home Mortgage line of business." Id. Plaintiff also attaches a
23 "Frequently Asked Questions" page from the same web site, which
24 states: "While Wachovia Corporation is now a part of Wells Fargo &
25 Co., Wells Fargo Bank, N.A. and Wachovia Bank, N.A. are still
26 separate banks." Abtahi Decl., Ex. A ("Frequently Asked

27 _____
28 ¹ Ali Abtahi, Counsel for Plaintiff, filed a declaration in support
of the Motion. Docket 19-1 ("Abtahi Decl.").

1 Questions").

2 In opposition, Defendants attach declarations from two
3 employees of the Bank and the Company: Oman and John Campbell.²
4 Oman declares that he occupies positions at both the Company and
5 the Bank, serving as the Bank's Director and Senior Executive Vice
6 President in addition to the above-mentioned role at the Company.
7 Oman Decl. ¶ 1. Oman admits that he participated in strategic
8 discussions "surrounding the Wachovia COSI, how the Wachovia COSI
9 operated, and the need to develop a substitute index" due to Wells
10 Fargo's acquisition of Wachovia, but he claims that he performed
11 these duties as an officer of the Bank, and not as an officer of
12 the Company. Id. ¶ 6. Oman admits that as an officer of the
13 Company, he has the responsibility to "render discrete service on
14 certain Wells Fargo & Company committees," id. ¶ 3, but he does not
15 identify these committees or describe his activity in these
16 committees. Oman declares that the only entities that made
17 decisions relating to the COSI were "Wachovia Mortgage FSB
18 (formerly known as World Savings Bank FSB), Wachovia Bank N.A. and
19 Wells Fargo Bank, N.A." Id. ¶ 5.

20 Campbell identifies himself as the "Pick-a-Payment Portfolio
21 Finance Manager at Wells Fargo" -- his declaration is unclear as to
22 whether "Wells Fargo" refers to the Bank or the Company. Campbell
23 Decl. ¶ 1. Campbell declares that since Wells Fargo and Company
24 acquired Wachovia, "the only entities that made decisions impacting
25 any loan originated by World and World's Cost of Savings Index" are
26 "Wachovia FSB, Wachovia Bank N.A. and Wells Fargo Bank, N.A."

27 ² Oman and Campbell filed declarations in support of opposition to
28 the Motion. Docket No. 24 ("Oman Decl."), 23 ("Campbell Decl.").

1 Campbell Decl. ¶¶ 1-2.

2 Defendants also suggest that Plaintiff's Complaint relies on
3 "conclusory allegations" to implicate Wells Fargo and Company, and
4 that the Court should determine fraudulent joinder under Federal
5 Rule of Civil Procedure 8's "strict pleading requirements
6 established by the Supreme Court in Bell Atlantic v. Twombly, 550
7 U.S. 544 (2007)." Opp'n at 5 n.2.

8 In light of the above, the Court finds that Defendants have
9 failed to show fraudulently joinder of Wells Fargo and Company,
10 because they have failed to provide clear and convincing evidence
11 proving that the causes of action against Wells Fargo and Company
12 must obviously fail according to California law. There is a
13 factual dispute over the Company's role in the acquisition of
14 Wachovia, specifically on the issue of the decision to replace the
15 Wachovia COSI with the Wells Fargo COSI. This ambiguity is
16 significant, given Defendants' identification of individuals who
17 held joint positions with the Company and the Bank and oversaw the
18 integration of Wachovia into Wells Fargo and Company. Because
19 Defendants' declarations and papers do not remove this ambiguity,
20 the Court must resolve this dispute in Plaintiff's favor. In
21 addition, Defendants have provided nothing to refute Plaintiff's
22 allegation that when the Company acquired Wachovia, it also
23 acquired the liability for Wachovia's earlier COSI rate change.

24 Defendant's suggestion that the Court apply Twombly to the
25 issue of fraudulent joinder also fails. The fraudulent joinder
26 inquiry concerns whether a plaintiff fails to state a cause of
27 action against a local defendant "according to the settled rules of
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1 the state," McCabe, 811 F.2d at 1339 (emphasis added), and Rule 8
2 is not the rule in California.

3 The parties also dispute the citizenship of Wells Fargo Bank,
4 with Defendants arguing that because the Bank is a national bank,
5 its principal place of business is irrelevant under 28 U.S.C.
6 § 1348 to the determination of citizenship in a diversity action.
7 Notice of Removal, ¶¶ 3, 5-9. Because the Court finds that
8 Defendants failed to show that the Company is fraudulently joined,
9 it does not reach this issue.

10
11 **V. CONCLUSION**

12 For the reasons stated above, Plaintiff Mostafa Tofighbakhsh's
13 motion to remand this case to the Superior Court of California,
14 County of San Francisco, is GRANTED.

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16 IT IS SO ORDERED.

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18 Dated: June 16, 2010

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20 UNITED STATES DISTRICT JUDGE
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